TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 152.

THE UNITED STATES, APPELLANT, vs. THOMAS R. LOVETT,

AND No. 153.

THOMAS R. LOVETT, APPELLANT, vs. THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED OCTOBER 15, 1874.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Petition	1	1
Traverse	11	5
Amendment to petition	12	5
Plea of limitation	13	6
Final judgment of the court	14	6
Application of Attorney-General for allowance of appeal	15	6
Order allowing same	15	6
Application of claimant for cross-appeal	16	7
Order allowing same	16	7
Findings of fact and conclusions of law	17	7
Opinion of the court	24	14
Dissenting opinion by Chief-Justice Drake	25	15
Certificate	31	21

1 In the Court of Claims.

THOMAS R. LOVETT
vs.
THE UNITED STATES. } No. 6247. Petition filed September 3, 1870.

To the Court of Claims:

Your petitioner, Thomas R. Lovett, of the city of Philadelphia, in the State of Pennsylvania, respectfully shows:

That on the 17th day of August, in the year 1861, your petitioner was seized, in trust for the benefit of Mrs. Louisa Fletcher, of a certain tract of land comprising about 90 acres, called "Kalorama," and adjoining the city of Washington, on the northwest; and the same was, on the day aforesaid, occupied by the family of the said Louisa Fletcher.

That on the said tract of land was a spacious mansion-house and other buildings, and the same was laid out and planted with trees and shrubbery of various kinds.

That the elevated position of said land, its improvements, proximity to Washington and other advantages, made it desirable to the United States as the site of an hospital for the soldiers of the Army of the United States, then gathered in great numbers at Washington, and at the instance of Brigadier-General Mansfield, then commanding
2 the United States forces in said city, your petitioner, by his agent, Chas. F. Fletcher, made to General Mansfield an offer in writing, dated Aug. 17, 1861, to lease the said tract to the United States in two portions, for the monthly rent of $450, and $100, respectively, of which writing a copy is hereto annexed, marked "Exhibit A."

That the said General Mansfield did not accept the said offer in the terms proposed, but did accept the offer with a modification contained in a writing bearing date the said 17th day of August, 1861, of which a copy is hereto annexed, marked "Exhibit B," and which modification was accepted by your petitioner, agreeing to hire the whole of the said tract of land as soon as vacated, for one year, with the privilege of retaining it three years, if desired, at the monthly rent of 500 dollars.

That, in pursuance of the said agreement, your petitioner caused the occupants of the premises to vacate the same, and delivered possession thereof to the duly-authorized agents of the United States on the 23d day of August, A. D. 1861, and the United States, by their agents, retained possession of the same until the first day of October, A. D. 1867.

That, in pursuance of said agreement, the United States, through their agent, Capt. E. E. Camp, quartermaster U. S. A., paid your petitioner rent for the said land at the rate of $500 per month until the 1st day of July, A. D. 1862.

That, on or about the day of , A. D. 1862, the said Capt. Camp, as your petitioner is informed and believes, addressed to the Quartermaster-General a letter, of which a copy is hereto annexed, marked "Exhibit C," in which he in substance requested authority to reduce the rent of a great number of buildings occupied or leased by the United States, and this without the consent or concurrance of the owners or lessors, which request was referred by the Quarter-
3 master-General to the Secretary of War, and was by him approved; and in consequence thereof the said Capt. Camp, when your petitioner next applied for the monthly rent, refused to pay more than $250 per month, from and after July 1, 1862.

That your petitioner protested to the said Camp against the reduc-

tion, and denied the right of the United States to make such reduction, but was informed by the said Capt. Camp that he was acting under an order of the Secretary of War, and your petitioner had no alternative but to accept the sum offered or to receive nothing.

That the United States continued to pay rent for the property at the rate of $250 per month from July 1, 1862, up to and including the 31st day of January, 1865, after which time, in consequence of the destruction of a portion of the buildings by fire, the quartermaster refused to pay more than $200 per month, and at that rate rent continued to be paid up to and including the 30th day of September, 1867, and on the expiration of that period the property was surrendered to your petitioner. And your petitioner avers that the entire amount paid him falls short of the amount justly due by the sum of $17,350.

That with the real estate so leased there were also leased and delivered to the United States, according to agreement, the following chattels, to wit:

A safe of the value of $60, a stove of the value of $33, a boiler of the value of $30, and a heater of the value of $95; none of which were found on the premises when surrendered, nor ever were returned to or received by your petitioner.

That during the occupation of the premises by the United States a long line of fencing thereon was, by troops or persons in public service, removed and used or destroyed, and also a large quantity of stone, constituting a boundary-wall, as well as large quantities of stone and
4 gravel in the ground, were taken away by persons in the military service of the United States, and used in making public corrals and roads, to the value of not less than $5,923.85.

That during the occupation of the premises a portion of the buildings were destroyed by fire, and the said loss was not repaired, nor any compensation therefor made, and your petitioner is advised and charges that, under the agreement hereinbefore set forth, the United States are liable to repair said loss on surrendering the property, or pay the cost of such repairs, which your petitioner charges to be of the value of $16,300.

The said building was insured, and from such insurance your petitioner received the sum of $10,000 as indemnification in part for said loss; but your petitioner is advised that said payment ought not to be credited by him to the United States, and he therefore states the fact, and submits the matter to the judgment of the court.

That during the occupation of the premises the buildings were further damaged otherwise than by ordinary wear and tear to the amount of $3,600, which damage was not repaired or made good by the United States, nor has any compensation been made to your petitioner for said damage; and, in addition thereto, shade-trees were cut down and used or destroyed to the value of $800.

That during the occupation of the premises the same were used as a small-pox hospital, and your petitioner avers that although he rented the property for a hospital, and without any expressed conditions as to the kind of diseases to be treated there, yet it was never contemplated by him, or, so far as he knows, by General Mansfield, that the premises should be converted into a pest-house. The consequence of the use of the premises as a small-pox hospital and burying-ground, and the ruinous condition in which they were left by the Government, has
5 been that the property could not therefore be either sold or rented, and your petitioner, so far from being able to obtain any reveuue therefrom, has been obliged to incur an annual expense in taking care

of the property. And if the court shall decide that the use of the property as aforesaid was not warranted by the terms of the lease, then your petitioner claims such compensation for such use as the court may upon the evidence award.

And your petitioner shows that he presented his said claim to the Secretary of War, who allowed on the same a sum exceeding twenty thousand dollars, and referred the case to the Quartermaster-General for official action, who referred the same to the accounting-officers of the Treasury, who allowed on the said claim the sum of $1,559.99, which your petitioner has refused to accept. And your petitioner claims the benefit of the official action of the Secretary of War in the premises for whatever may be its legal effect in his favor.

And your petitioner makes the following claim, founded upon the contract hereinbefore set forth:

1. Rent from August 23, 1861, to October 1, 1867—73 months and 8 days, at $500	$36,645	16
Less total payments	19,295	16
	$17,350	00
2. Stove, boiler, safe, &c	218	00
3. Wall and other materials	5,923	85
4. Rebuilding burnt buildings	16,300	00
5. Repairing other buildings, &c	4,400	00
6. Additional compensation for use of the property for small-pox patients, &c	20,000	00

And your petitioner further shows that he and the said Louisa
6 Fletcher have at all times borne true allegiance to the Government of the United States, and have never given any aid or comfort to the rebellion against the said Government.

THOS. R. LOVETT.

CITY AND COUNTY OF PHILADELPHIA,
State of Pennsylvania, ss:

On this second day of September, in the year eighteen hundred and seventy, before the undersigned, Jacob Good, alderman and ex-officio justice of the peace, personally appeared Thomas R. Lovett, and signed the foregoing petition, and made oath that no assignment or transfer of the claim therein stated, or any part thereof or interest therein, has been made; that he is justly entitled to recover the amount therein claimed from the United States, after deducting all just credits and offsets, and that he believes the facts as stated in the said petition to be true.

[SEAL.] JACOB GOOD,
Alderman.

EASTERN DISTRICT OF PENNSYLVANIA,
City and County of Philadelphia, ss:

I, James Ross Snowden, prothonotary of the supreme court of Pennsylvania in and for the eastern district, do certify that Jacob Good, esq., before whom the annexed affidavit was made, was at the time the same was made and now is an alderman and ex officio a justice of the peace of the city and county of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments, &c., to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere, and that his signature thereto is genuine.

7 In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Philadelphia, this 2d day of September, A. D. 1870.

[SEAL.] JAMES ROSS SNOWDEN,
Prothonotary.

CARLISLE & McPHERSON,
Attorneys for Claimant.

8 *Exhibit A.*

GENERAL: Enclosed is a note of terms for the mansion and lower grounds of Kalorama.

The upper grounds contain about seventy acres, which may be occupied by the quartermaster for horses and wagons, or whatever else may be desired, at the rent of one hundred dollars per month.

Respectfully,

CHARLES F. FLETCHER,
For Thomas R. Lovett, Trustee.

To Gen. MANSFIELD, *B. G.*, &c.

KALORAMA, *August* 17, 1861.

GEN. MANSFIELD:

SIR: I offer to the Government, for the purposes of an hospital, that part of the place known as Kalorama, comprising the house and porter's lodge, together with about thirty acres of land immediately surrounding and including both sides of Rock Creek, bordering the same, upon the following terms:

The lease to be for the term of three years, with the privilege to the Government to renew the same for three years longer at the same rent, at four hundred and fifty dollars per month.

There will be left in the building a portable furnace and hall stove for the use of the Government. It will be stipulated that the trees and shrubbery on the grounds shall be strictly protected, and any unnecessary injury to the same to be compensated for by the Government.

9 The buildings to be kept in repair by the Government, and to be left in as good repair as ordinary wear and tear will permit. The grounds having already been occupied by troops, and the fence thereby destroyed, it is expected that the Government will renew them, and leave them in good repair at the expiration of the term.

Very respectfully yours, &c.,

CHARLES F. FLETCHER,
For Thomas R. Lovett, Trustee.

Exhibit B.

HEADQUARTERS, DEPT. OF WASHINGTON,
Washington, August 17, 1861.

As soon as vacated, within two weeks, the United States will hire the whole property of Thomas R. Lovett, trustee of Mr. Charles F. Fletcher, as above, on the following terms, inclusive of the upper lot and all his land and privilege, for five hundred dollars per month, for the period of one year, with the privilege of keeping it at least three years, if desirable for all purposes.

MANSFIELD,
B. G., &c.

Exhibit C.

DEPT. QUARTERMASTER'S OFFICE,
CORNER 18 AND G STREET,
Washington, D. C., June 3d, 1862.

GENERAL: I have the honor to report that I now have upon my
10 report of persons and articles a number of houses and pieces of property in and about this city, some of which were transferred to me by Major Miller and Major Beckwith; others I hired myself. I am convinced that too much rent is being paid for these premises; they were hired at a time when it was considered that their occupation would be but temporary, and as we took no military possession of property, we were compelled to pay the rates demanded. Their occupation being now of a permanent nature, I am desirous of reducing the rent of them, and would respectfully apply for authority to do so.

These premises cannot be vacated without injury to the public service. I am satisfied that the owners of them would protest against the proposed reduction.

Very respectfully, your obedient servant,

E. E. CAMP,
Captain, A. Q. M.

Brig. Gen'l M. C. MEIGS,
Quartermaster-General U. S. Army.

[Submitted by General Meigs to the Secretary of War, and returned by him approved.]

11 In the United States Court of Claims, December term, A. D. 1870.

THOMAS R. LOVETT
vs.
THE UNITED STATES. } No. 6247. Filed Apr. 21, 1871.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of sixty-four thousand one hundred and ninety-one dollars and eighty-five cents, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOM'S H. TALBOT,
Assistant Attorney-General.

12 THOMAS R. LOVETT
vs.
THE UNITED STATES. } No. 6247.

And now comes the claimant and moves for leave of the court to amend his petition by adding after the words on page 5, "who allowed in the said claim the sum of $1,559.99 which your petitioner has refused

to accept," the words "and brings the draft issued therefor here into the court."

CARLISLE & McPHERSON.

Filed and allowed March 4, 1874.

13 In the Court of Claims of the United States, December term, 1873.

Plea.

THOMAS R. LOVETT *vs.* THE UNITED STATES. } No. 6247.

Now come the defendants, by their Attorney-General, and say that the claimant herein should not further have or maintain suit against the defendants for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

JOHN GOFORTH,
Assistant Attorney-General.

Filed Feb. 5, 1874.

(Indorsed:) No. . Court of Claims. vs. The United States.

Plea. , Assistant Attorney-General. Filed , 187 .

14 In the Court of Claims.

THOMAS R. LOVETT *vs.* THE UNITED STATES. } No. 6247.

At a Court of Claims held at the Capitol in the city of Washington, eighteenth day of May, A. D. 1874, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Thomas R. Lovett do have and recover of and from the United States the sum of twenty thousand dollars, ($20,000.)

By the court.

15 In the United States Court of Claims, Dec. term, 1873.

THOMAS R. LOVETT *vs.* THE UNITED STATES. } No. 6247.

From the judgment rendered in the above entitled cause on May 18, 1874, in favor of the claimant, the defendants, by their Attorney-General, on the 30th day of June, 1874, make application for, and give notice of, an appeal to the Supreme Court of the United States, the amount in controversy exceeding three thousand dollars, to wit, twenty thousand dollars.

JOHN GOFORTH,
Asst. Atty.-General.

Filed June 30, 1874.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

16 In the Court of Claims, Dec. term, 1873.

THOMAS R. LOVETT
vs.
THE UNITED STATES. } No. 6247.

And now, this 30th day of July, 1874, comes the claimant, and prays an appeal to the Supreme Court of the United States from the judgment of this court in this cause, rendered on the 18th day of May, A. D. 1874.

CARLISLE AND McPHERSON,
Att'ys for Claimant.

Filed July 30, 1874.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

17 United States Court of Claims.

THOMAS R. LOVETT
vs.
THE UNITED STATES.

The petitioner claims against the United States upon an agreement for the hire and occupation of the real estate and premises known as the Kalorama, and specified in the petition, and the court finds the facts to be:

That the petitioner, as trustee of Mrs. Louisa Fletcher, was, on the 17th day of August, 1861, seized in fee of said premises, containing about ninety-one acres, a dwelling-house with wings, measuring in all 150 by 40 feet, a large stable, and a frame building, with a garden, lawns, and walks, a fence all around the premises, and a substantial wall, about a quarter of a mile long, from Rock Creek to the lodge-gate on Boundary street, and trees of various kinds and shrubbery.

In consequence of application made to him for the lease of the premises to the United States for a hospital, by General Mansfield, the petitioner authorized the writings hereto annexed, and marked 1 and 2.

No. 1.

"GENERAL: Inclosed is a note of terms for the mansion and lower grounds of Kalorama.

"The upper grounds contain about seventy acres, which may be occupied by the quartermaster for horses and wagons, or whatever else may be desired, at the rent of $100 per month.

"Respectfully,

"CHARLES F. FLETCHER,
"*For Thomas R. Lovett, Trustee.*

"To General MANSFIELD, *B. G., &c.*"

No. 2.

"KALORAMA, *August* 17, 1861.

"GENERAL MANSFIELD:

"SIR: I offer to the Government, for the purposes of a hospital, that part of the place known as Kalorama, comprising the house and porter's

lodge, together with about thirty acres of land immediately surrounding and including both sides of Rock Creek, bordering the same, upon the following terms:

"The lease to be for the term of three years, with the privilege to the Government to renew the same for three years longer, at the same rent, $450 per month.

"There will be left in the building a portable furnace and hall-stove for the use of the Government. It will be stipulated that the trees and shrubbery on the grounds shall be strictly protected, and any unnecessary injury to the same to be compensated for by the Government, the buildings to be kept in repair by the Government, and to be left in as good repair as ordinary wear and tear will permit. The grounds
18 having already been occupied by troops, and the fence thereby destroyed, it is expected that the Government will renew them, and leave them in good repair at the expiration of the term.

"Very respectfully yours, &c.,

"CHARLES F. FLETCHER,
"*For Thomas R. Lovett, Trustee.*"

And thereafter General Mansfield issued the following:

No. 1.] "HEADQUARTERS DEPARTMENT OF WASHINGTON,
"*Washington, August* 17, 1861.

"As soon as vacated, within two weeks, the United States will hire the whole property of Thos. R. Lovett, trustee of Mr. Charles F. Fletcher, &c., above, on the following terms, inclusive of his upper lot, and all his land & privileges, for $500 per month for the period of one year, with the privilege of keeping it at least three years, if desirable for all purposes.

"MANSFIELD, *B. G., &c.*"

And sent it to the petitioner.

Under the agreement above made the United States entered upon and occupied the said premises, specified in General Mansfield's order, from August 23, 1861, to September 30, 1867, inclusive.

For rent of said premises, the United States paid to the said Lovett $500 per month from August 23, 1861, to June 30, 1862; and for each monthly payment the petitioner signed a receipt in the form of a copy of which is hereto annexed and marked "Receipt No. 1."

Receipt No. 1.

[No. 97. Abstract B, third quarter, 1862.]

"*The United States to Thomas R. Lovett, trustee, Dr.*

	Dollars.	Cents.
"1862. For rent of Kalorama, occupied as hospital, from June 1st to June 30, 1862, at $500 per month.....	500	

"Copy of deed filed with volume 180, fourth quarter, 1861.
"See report of persons and articles for June, 1864, page 4.

"I certify that the above account is correct and just; that the services were rendered as stated; and that they were necessary for the public service.

"E. E. CAMP,
"*Captain, A. Q. M.*

"Received at Washington, D. C., the 15th of July, 1862, of Capt. E. E. Camp, assistant quartermaster United States Army, the sum of five hundred dollars and cents, in full of the above account.

"THOMAS R. LOVETT, *Trustee.*"

(Duplicate.)

And for rent of said premises the United States paid to the petitioner $250 per month from July 1, 1862, to February 1, 1865; and for each monthly payment the petitioner signed a receipt in the form annexed, and marked "Receipt No. 2."

19 *Receipt No. 2.*

[No. 60. Abstract B., October, 1862.]

"*The United States to Thomas R. Lovett, trustee, Dr.*

	Dollars.	Cents.
"1862.—For rent of Kalorama, occupied as a hospital and camp-grounds, from July 1 to September 20, 1862, at $250 per month	750	

"Copy of deed filed with volume 180, fourth quarter, 1861.

"See report of persons and articles for September, 1862, page 3.

"I certify that the above account is correct and just; that the services were rendered as stated; and that they were necessary for the public service.

"E. E. CAMP,
"*Captain, A. Q. M.*

"Received, at Washington, D. C., the 9th October, 1862, of Capt. E. E. Camp, assistant quartermaster United States Army, the sum of seven hundred and fifty dollars cents, in full of the above account.

"THOS. R. LOVETT, *Trustee.*"

(Triplicate.)

And from the 1st of February, 1865, to September 30, 1867, inclusive, the United States paid to the petitioner for rent of said premises $200 per month; and for each payment the petitioner signed a receipt in the form annexed, and marked "Receipt No. 3."

Receipt No. 3.

[No. 66. Abstract B, September, 1867.]

"*The United States to Mr. Thos. R. Lovett, trustee, Dr.*

1867.	Dollars.	Cents.
"Sept. 30. For rent of Kalorama, as hospital and camp-ground, from September 1, 1867, to September 30, 1867, one month	200	00

"I certify that the above account is correct and just; that the services were rendered as stated; and that they were necessary for the public service.

"A. P. BLUNT,
"*Brvt. Col. & A. Q. M., U. S. A.*

"Received, at Washington, D. C., the 30th of September, 1867, of Bvt. Col. A. P. Blunt, assistant quartermaster United States Army, the sum of two hundred dollars and cents, in full of the above account.
"THOS. R. LOVETT, *Trustee.*"

While the United States occupied the premises from August 23, 1861, to September 30, 1867, the main house was burned, the flower-garden and shrubbery were destroyed, three and one-half miles of fence torn down; a brick wall fifty feet long, nine feet high, and fourteen inches thick, was torn down, and the bricks used, partly for pavement and partly for building a lime-house, where the United States put clothes for purifying them; and some sheds were torn down. The part of the house not burned, about fifty feet long, was greatly damaged, and the glass, with the sashes, were carried away. Ornamental and shade trees of various kinds were cut down, a stone wall was taken down and most of it carried away, and stone was quarried and gravel dug from a stone quarry and a gravel-pit on the premises and carried away; and the premises were left in a dilapidated condition, and the house unfit for occupancy; and to have restored the building and premises to their condition when leased, reasonable wear and tear excepted, would have cost $20,000.

The stone quarried and carried away by the United States amounted to 2,327 perches, and was worth 25 cents per perch	$581 75
The gravel dug and carried away by the United States amounted to 2,347 yards, and was worth $21\frac{7}{10}$ cents per yard	509 20
The stone wall taken down and carried away amounted to 505 perches, and was worth $3.50 per perch	1,767 00

The extent and valuation of the damage to the part of the dwelling-house not burned, or to other buildings, the number or the value of the trees cut down, the value of the brick wall or fence destroyed, and the disposition of a fire-proof safe, boiler, stove, and heater were not shown.

That two regiments of the Army of the United States were, previous to said written contract, by them encamped on the northern part of said premises, and thereon and during such occupation, previous to said contract, about fifteen hundred trees were cut down and a portion of the fencing destroyed by the soldiers of said regiments.

That all the injuries to said premises during the occupation thereof, or of any part thereof, either previous to or during said written contract, were done by the military forces of the United States, engaged in suppressing the rebellion, and who were encamped on the premises previous to said written contract, or who occupied them under said contract.

The dwelling-house was used by the United States for a small-pox hospital, and the grounds as a camping-ground for soldiers. Seven or eight soldiers who died were buried on the place; and since it was vacated by the United States, September 30, 1867, it has not been rented.

At the time the dwelling-house was burned it was insured by the Ætna Insurance Company and the Firemen's Insurance Company, on two policies of $5,000 each. Those companies adopted as their highest rate of insurance on buildings three-fourths of their cash value. The amount of the insurance, $10,000, was paid to the petitioner for a total loss.

On the 21st of December, 1868, the petitioner presented for payment to the United States the following account or bill, marked "Bill."

Bill.

"*The United States to Thomas R. Lovett, trustee, Dr.*

"1867.			
Octo. 1.	To rent of Kalorama from August 23, 1861, to Oc-		
A[1]. A[2].	tober 1, 1867, 73 months, 8 days, at $500		36,645 16
	By cash on account		19,295 16
	Balance		17,350 00
Vo. 1.	Damage to out-buildings		3,300
2.	Do. " stable		200
21	1 & 2. Do. " lodge		100
	B. C. D. Value of stone taken from the quarry, 6,659 pr., at 25 cents		1,664 75
B. C. D.	Value of gravel taken from the pit, 2,347 yards, at 30		704 10
2. 4.	Trees destroyed		800
B. D.	Stone wall taken, 505 perches, at $5		2,525
2 5 & 4	1,000 panels of fence		1,000
	Fire-proof safe	60	
	Boiler	30	
	Stove	33	
	Heater	95	
			218
			27,861 85

E. & O. E.

"JNO. D. McPHERSON,
"*Attorney, &c.*

"DECEMBER 9, 1868."

On February 8, 1870, the following notice, marked "Notice," was sent to the petitioner:

Notice.

"WAR DEPARTMENT,
"QUARTERMASTER-GENERAL'S OFFICE,
"*Washington, D. C., February* 8, 1870.

"THOMAS R. LOVETT, Esq.,
"*Washington, D. C.:*

"SIR: You are respectfully informed that your claim as trustee, &c., of the premises known as 'Kalorama,' in this District, has this day been referred to the Third Auditor of the Treasury for the payment of $21,040.42.

"Very respectfully, your obedient servant,
"By order Acting Quartermaster-General.

"JAMES A. EKIN,
"*Deputy Quartermaster-General,*
"*Brevet Brig. Gen'l, U. S. A.*

"120–103 Claims."

The facts following were requested by the petitioner.

In October, 1867, the claimant made out and presented to the Secretary of War the following claim:

U. S. to Thos. R. Lovett, trustee. *Dr.*

1867.			
Oct. 1.	To whole amount of rent according to contract, from August 22d, 1861, to October 1, 1867, 73 months 8 days, @ $500 per month		36,645 16
	Less amount received, from August 23, 1861, to July 1, 1862, @ $500 per month	5,145 16	
	From July 1, 1862, to January 31, 1865, @ $250 per month	7,750 00	
	From January 31, 1865, to October 1, 1867, @ $200	6,400 00	
			19,295 16
	Balance		$17,350 00
22	To estimated cost of rebuilding burnt portion of mansion	16,300	
	Less insurance	10,000	
			6,300 00
	To estimated damage to outbuildings and wing, independently of fire		3,300 00
	To damage to stable		200 00
	To damage to lodge		100 00
	To value of stone taken from quarry, (2,327 perch)		581 75
	To value of gravel taken from pit, (2,777 yards)		833 00
	To damage to hill in consequence of digging gravel		500 00
	To trees destroyed		800 00
	To cost for replacing stone wall on Boundary street, (420 perch)		1,310 00
	To 1,000 panels rail-fence		1,000 00
	To fire-proof safe		60 00
	To copper boiler		30 00
	To hall-stove		33 00
	To portable heater		95 00
			$32,493 25

Which was by the Secretary indorsed as follows:

(Indorsed:) "28–1–'70. $\frac{120}{103}$ Kalorama. Referred to the Quartermaster-General for investigation and report.

"EDWIN M. STANTON,
"*Secretary War.*

"FEBRUARY 12, 1868."

On this claim the Quartermaster-General reports as follows:

"QUARTERMASTER-GENERAL'S OFFICE,
"*Washington, D. C., November* 11, 1869.

"Hon. WM. W. BELKNAP,
"*Secretary of War, Washington, D. C.:*

"SIR: I have the honor to return the inclosed claim of Thomas R. Lovett, trustee, &c., for rent and repair of premises known as 'Kalorama,' in this city, and for gravel, stone, &c., stated at $32,493, referred to this office from the War Department for further report, in connection with the additional evidence presented, and to invite your attention to the full abstract of the case herein.

"I consider the order of General Mansfield taking possession, and directing a monthly payment of $500, and the fact of the claimant receiving and receipting for this amount, sufficient evidence of a contract

or lease, and therefore recommend that rent be paid from August 23, 1861, to October 1st, 1867, 73 months, 8 days, at $500 per month, amounting to $36,633.33, subject to the deduction of all sums which were paid the claimant for the use of the premises during United States occupancy.

"It is evident from the abstract that injustice was done the claimant in the previous recommendation of Acting Quartermaster-General Rucker, as to the allowance for gravel taken and used.

"I recommend that Mr. Lovett be paid for 2,777 yards (60,250 bushels) of gravel, at the same rate as that allowed by the War Department in the 'Dennison' case, viz, one (1) cent per bushel, amounting to $602.50.

"So much of General Rucker's recommendation as is for re-
23 pairs, $2,300, and for 2,327 perches of stone, at 25 cents per perch, amounting to $581.75, I recommend to be adhered to.

"Very respectfully, your obedient servant,

"J. C. McFERRAN,
"*Deputy Quartermaster-General,*
"*Acting Quartermaster-General.*"

This report being examined by an officer of the War Department, he made a report to the Secretary, concluding with the following recommendation:

"As to the items mentioned in Mr. Lovett's proposition as being in the house, a fire-proof safe, copper boiler, hall-stove, &c., and for which an aggregate charge of $218 is made, Messrs. Allen and Yeatman say that they are unable to determine whether the responsibility for these rests with the Quartermaster's or Medical Department, and the Quartermaster-General does not ask authority to pay them. It is considered, however, that, the responsibility of the Medical Department being a matter of doubt, they should be paid for by the same Department as the rest.

"It is recommended, therefore, that the Acting Quartermaster-General be directed to make the payments recommended in his letter of November 11, 1869, and to pay, in addition, the sum of $218 for the items last referred to."

Upon which the Secretary of War indorsed as follows:

"Approved:

"WM. W. BELKNAP,
"*Secretary of War.*"

Whereupon the Quartermaster-General wrote to the claimants as follows:

"WAR DEPARTMENT,
"QUARTERMASTER-GENERAL'S OFFICE,
"*Washington, D. C., February* 8, 1870.

"THOMAS L. LOVETT, Esq.,
"*Washington, D. C.:*

"SIR: You are informed that your claim as trustee, &c., of the premises known as 'Kalorama,' in this District, has this day been referred to the Third Auditor of the Treasury for the payment of $21,080.42.

"Very respectfully, your obedient servant,
"By order of the Acting Quartermaster-General,

"JAMES A. EKIN,
"*Deputy Quartermaster-General,*
"*Brevet Brigadier-General, U. S. A.*

"Allowed on request of petitioner. E. G. L."

That the accounting officers of the Treasury disapproved of the recommendation of the War Department and rejected the claim except as to the sum of $5,159.99, of which action the claimant was duly advised.

That the following letter was received by the Quartermaster-General:

"WASHINGTON, *January* 31, 1868.

"To Brig. Gen. RUCKER, A. Q. M. G.,
" *Washington, D. C.:*

"GENERAL: In reference to the accompanying account, I would respectfully state that the place known as 'Kalorama,' lately occu-
24 pied by the Government, (a plat of which accompanies this communication,) comprises about ninety acres of land. It was hired on the 17th day of August, 1861, by Brigadier-General Mansfield, on the part of the Government, as an hospital and camp-grounds, by written contract, at a monthly rent of $500; of which contract the following is a copy:

"'HEADQUARTERS DEP'T OF WASHINGTON,
"' *Washington, August* 17, 1861.

"'As soon as vacated, within two weeks, the United States will hire the whole property of Thos. R. Lovett, trustee of Mr. Charles F. Fletcher, &c., above, on the following terms, inclusive of his upper lot and all the land and privileges, for $500 per month for the period of one year, with the privilege of keeping it at least three years, if desirable, for all purposes.

"'MANSFIELD,
"' *Brigadier-General, &c.*'

"Possession of the premises was given on the 23d day of August, and, on the 10th day of October following, the contract was filed in the office of Capt. E. E. Camp, A. Q. M., and by him entered on the roll by order of Brigadier-General Van Vliet.

* * * * * * *

"I am, respectfully,

"THOS. R. LOVETT,
" *Trustee, &c., Mount Airy, Philadelphia, Pa.*"

CONCLUSIONS OF LAW.

And the court find as conclusions of law—

That the letter of Charles Fletcher for Thomas R. Lovett, trustee, dated Aug. 17, 1861, addressed to General Mansfield, as qualified by General Mansfield's reply dated Aug. 17, 1861, & with that, made a contract of lease subsequently acted on by the parties, by the terms of which the United States were bound to repair the premises in case of their damage by fire, and to release them in as good repair as ordinary weather would permit.

That under said contract & under the tenantcy between the parties the United States were liable for injuries to the premises, in the nature of waste.

That the claimant is not entitled to damages for the use of the premises as a small-pox hospital by the United States.

That the claimant is barred of all claims for reductions of rent by his receipts in full given for such rents.

That the United States were not entitled to be credited with $10,000 paid to the claimant by insurance companies on policies of assurance obtained & paid for by him for his benefit.

That the report of the officers of the Quartermaster's Department that $21,040.42 were due to the claimant, approved by the Secretary of War & ratified by the War Department to the claimant, was not binding & conclusive on the United States.

That the claims of the petitioner for loss by fire & damage by acts of waste were not barred by the statute of limitations.

LORING, J., delivered the opinion of the court:

The premises were hired by the United States for a rent specified, and thus a contract was made under which the lessors surrendered the possession of the premises to the United States, and they occupied them from August 23, 1861, to September 30, 1867.

The first question is as to the terms of the contract. The petitioner claims that the terms he proposed were accepted so far as they were not modified by the order of General Mansfield, and we think that is the fair inference from the circumstances, because the terms not modified were such as are usual and proper in such contracts and such as parties entering upon them would expect and make; and they were especially proper and called for in this case, in which the premises were to be occupied by large numbers of common soldiers, whose use of them would be very different from that of a private family, and for whose use of them the United States, who held them there, should be responsible; and then the evidence shows that it was the practice of the United States to repair premises they had occupied, and therefore the parties would expect it. As to the fence destroyed during the occupancy by the United States of the northern part of the premises, before the written contract, they were then liable for that, and the agreement they should restore it and return it would be just and equitable.

It is a common thing that a contract should be contained in several papers; and if they are made at the same time, between the same parties, and in relation to the same subject, they are held to constitute one contract.

And the question is not whether a contract was made, but as to the terms of the contract as they were understood by the parties at the time, and this is to be inferred from the circumstances shown. And where terms proper to the subject of the contract are proposed for acceptance, and a modification is made of some of them, and not of the others, the presumption would seem to be that those not modified were accepted.

And we therefore adopt the construction claimed by the petitioner, and on that the contract was as follows: The entire premises at $500 per month, for one year, with the right in the United States of renewal for three years, determinable within that time by them. The trees and shrubberies to be strictly protected, and any unnecessary injury to be compensated for by the Government. The buildings to be kept in repair by the Government, and to be left in as good repair as ordinary wear and tear will permit. The fence, destroyed before the written contract, to be restored and left in good repair.

The petitioner claims the amount of reductions made from time to time in the rent stipulated in the contract. But, without protest, he receipted for the reduced payments as payments in full for the time specified in the receipts, and we think this bars his claim.

The petitioner claims indemnity for the injuries he sustained from the fire, and we think he is entitled to it. The rule between landlord and tenant is that, on an express agreement to repair and keep in repair, the tenant is liable for loss or injury by accidental fire. This was ex-

pressly held in 6 T. R., 650, Bullock vs. Demmet, and was there declared to have been decided law long before. And it has never been questioned since, but often affirmed both in England and in this country. (Buckworth Canal Company vs. Pritchard, 6 T. R., 750; Philips vs. Stevens, 16 Mass., 245; 6 idem, 63.)

The learned counsel for the defendants claimed that such a liability did not attach to the tenant, without a deed with express covenants to repair the premises in case of fire, and for this cited a verbal inaccuracy in Taylor's Landlord and Tenant, § 146. But a deed or covenant is only an express agreement under seal, and the only effect of the seal is to import a consideration; the binding force is the agreement or contract, and this may as well be verbal or it may be inferred. Mr. Taylor, in his work cited, says: "In general, where circumstances exist from which an agreement may be inferred, they are equivalent to an express agreement." (Taylor, § 247.) And in reference to the liability of a tenant, 1 Parsons on Contracts, 425, says: "If there be an express and unconditional agreement to repair, or to redeliver in good order, or to keep in good repair, the tenant is bound to do this, even though the premises are destroyed by fire, so that he is compelled to rebuild them." And the numerous authorities he cites, both English and American, are to that effect.

All that is true is that where a tenantcy from year to year is by mere occupancy, without any express agreement, the liability for destruction by fire is held not incidental to such mere occupancy. That is the decision in Holt, 7, 1 Marshall, 567, and other authorities cited for the defendant. And it is the rule in Maryland where the parties contracted. Thus, in 4 Harris & Johnson, in the case of Wagner vs. White, which was for destruction by rioters, it was held the claim was not incident to mere use and occupation, but was recoverable on an express though verbal agreement.

Then the petitioner claims for damages done generally to the premises; these certainly were excessive and in the nature of waste, for which the tenant is liable at common law, without any express agreement to repair, for he is bound to use the premises in a husbandlike manner. This is incidental to the relation of landlord and tenant, and as much a part of their contract as if expressed in terms, and any default of the tenant in this is a breach of contract, for which he is liable in damages.

26 The statement of facts shows that the premises were in excellent order when the United States took possession of them under the written contract, and they left them dilapidated and in ruinous condition; the flower-garden and shrubberies were destroyed, shade and ornamental trees were cut down to the amount of thousands, some miles of fence were destroyed, a brick wall, 50 feet long, 9 feet high, and 14 inches thick, was taken down; a stone wall was taken down and its materials carried away; shed and outbuildings were destroyed; the part of the house not burned was abused and its sashes and glass carried away, and large quantities of gravel and stone were dug from pits and quarries on the place and carried away and used elsewhere. And the only qualification of this extensive and voluntary waste is that, previous to the written contract, soldiers encamped on the northern part of the premises by the United States had there destroyed about fifteen hundred trees and some fence.

Some of the bricks taken from the wall were used to make walks on the place, and others to build a lime-house, which the United States used to fumigate clothes of their sick; and it was claimed by the United States that these walks and lime-house remained on the place. That

may be, but nevertheless taking down the wall and using the bricks to make walks and a lime-house was strictly waste; the petitioner may not desire a lime-house in which to fumigate the infectious clothes of a small-pox hospital, nor brick walks instead of gravel walks. And the United States are liable for the cost of removing the lime-house and walks, and restoring the walls and sheds, &c., as well as for the other injuries recited.

It was shown in evidence that many soldiers were buried on the premises, and this, we think, the contract did not authorize. A hospital is not a charnel-house, and such use of such premises is not usual, and the dead are generally buried in burying-grounds appropriated to the purpose.

It was also shown that the building was used as a small-pox hospital, and the petitioner claimed this as a special cause of damage. But we think such a claim cannot be supported. The building was hired for a hospital, and no exception was made of any particular kind of hospital, or any particular species of infectious diseases, to all of which soldiers are subject.

It was also shown that after the United States vacated the premises, the petitioner presented his claim, amounting to $32,493.25, to the Secretary of War, who referred it to the Quartermaster-General, who referred it for examination to the officers of his Department. They examined the case and reported upon it that the sum of $21,040 42 were justly due, and this was approved by the Secretary of War, and the petitioner was notified by the War Department that his claim had been referred to the Third Auditor for payment of the sum specified. But the sum was not paid.

The petitioner contended that this finding, approved by the Secretary of War, was in the nature of a judgment, and concluded his right to recover the amount stated; and he cited and relied on the case of the United States vs. Jones, 18 Howard, 92. In that case an officer was sick abroad, and in France, and procured medical attendance, and afterward, while he was employed on special service there, in collecting information as to a steam navy, the Secretary of War sent to him the money to pay for his medical attendance, and it was so applied. It was held that the United States were legally bound to furnish the officer with medical attendance, and that where the Army surgeons could not
27 be employed, others must be, and the Secretary might employ them or ratify their employment, and pay them; and that the officer having applied money he received according to the command of his superior, could not be charged with it in his accounts at the Treasury, which was the point in issue. Thus the case was but the payment of a debt of the United States, like the payment for forage purchased, and in the regular course of the service, in which the subordinate executed the order of his superior. But the case at bar is entirely a claim for unliquidated damages for breach of contract, for the relation of landlord and tenant, however formed, rests on contract. And we think that neither the War Department nor the Secretary of War were authorized to finally adjudicate the claim and conclude the parties to it.

The defendants contend that the writings which passed between the parties did not constitute a lease, but was an executory agreement only, and the occupancy was from year to year and independent of the writings.

Whether writings make an actual lease or an executory agreement for a lease depends on the intent of the parties as shown by their words and acts, and when the parties surrender and take possession on and

according to writings made between them, the legal presumption is that the writings were intended for a lease, because the parties have so acted on them. Now here the writings consist of specified terms, and the modification of part of them. And General Mansfield's letter is that the United States will hire on a certain event, viz, the vacation of the premises by the lessor, and that is made and the United States enter. And this, we think, proves the intent to hire and let therefrom, on the terms proposed and modified, in the writings, and by and under those writings, and especially as no other writings were made, and those made were acted on. And, if so, then necessarily the lease was for a year certain, for General Mansfield specifies that term, and the right of the United States to renew under the contract did not begin till after that year had expired, and then the renewal was executed by the occupation of the United States, continued after the first year, and was thus executed for three years certain, determinable sooner by the United States only, because a renewal for that time, and no other, was expressly stipulated between the parties. And the renewal and all the subsequent occupation by the United States were on the terms of the first contract, so far as they were applicable and not subsequently altered, as in the case of the reduced payments.

The statement of facts shows that at the time the house was burned it was insured by the petitioner for his benefit for the sum of $10,000, which was paid to him as for a total loss; and it was claimed for the defendants that if they were liable for the loss by fire they were to be credited with this sum as subrogated for the petitioner in the benefits of his contract with the insurance companies. But we think the defendants have no such rights. Such subrogation of the insurer for the insured belongs to marine insurance, which is a part of commercial law; and it is a doctrine of English equity law, for both of these deal with equities, but it does not belong to the common law, which deals with contracts, nor to the relation of landlord and tenant. And it was introduced into marine insurance upon the difference between an actual total loss and a technical or constructive total loss, in which there is salvage and abandonment. But there is no such thing in fire-insurance on buildings, and there is no such rule between landlord and tenant in the common law. The fire-policy of a landlord, made in his own behalf and at his cost, does not attach to the building insured, but is personal to
28 him. It is not a covenant running with the land, for these always are referable to tenure and require privity of estate and must affect it in quantity or quality, value or enjoyment; and a fire-policy does none of these things, and therefore does not enure to the benefit of the grantee of the insured. The lessee is a grantee, for a lease for a rent is legally a sale of the premises for a term.

The rule as to fire-policies on buildings was determined in the case of Carpenter vs. The Providence Washington Insurance Company, (16 Peters, 495,) in which the benefit of a fire-policy procured by the owner of premises insured was claimed by his mortgagee of the premises. In their opinion the court had referred to and cited previous cases decided by them, and cases decided by Lord King and Lord Hardwicke; and then they say: "The language of Lord King and Lord Hardwicke, and of this court in the cases already cited, show conclusively that policies of this sort are not deemed in their nature incidents to the property insured, but that they are mere special agreements with the persons insuring against such loss or damage as they may sustain, and not the loss or damage that any other person having an interest as grantee, or mortgagee, or creditor, or otherwise, may sustain by reason of a subsequent

destruction thereof by fire." On this authority we hold the claim made by the defendants not sustainable.

The defendants pleaded the statute of limitations to all the claims of the petitioner. As to the claims for reductions of rent, we have held these barred by the receipts in full, given as the rents became due. As to the claims for loss by fire, and for acts of waste done during the written contract, neither the evidence nor the plea specifies when they were done; and all that appears is that they were done previous to the vacation of the premises by the United States, which was September 30, 1867, and that was three years only before the filing of the petition, which was in September, 1870. The defendants, therefore, do not as to those substantiate their plea. The plea is efficient, therefore, only for the damage done before the written contract; and for that we allowed it in the assessment of damages.

DRAKE, Ch. J., dissenting:

I dissent from so much of the opinion just read as holds: 1, that the claimant's offer of the Kalorama property was agreed to by General Mansfield; and, 2, that the claimant is entitled to recover for the injury done to the property by the troops while occupying it, for the burning of the house, and for the rock, gravel, &c., taken from the premises by the military forces of the United States. In my opinion, there is not the least foundation in law for any recovery on any of those grounds

In the first place, what was the contract between the claimant and the United States represented by General Mansfield? This is to be found nowhere but in the letters of the claimant and General Mansfield of August 17, 1861.

It is claimed that General Mansfield's answer accepted the claimant's proposition, with a modification, and that all of the terms of the proposition, which General Mansfield did not by his answer modify, were accepted and agreed to by him. This view seems to me to be entirely at variance with all well-established rules governing the establishment of a contract through "a request on the one side and an assent on the other."

The doctrines applicable to such a case are very clearly stated in 1 Parsons on Contracts, 5th ed., 475, et seq., as follows:

"There is no contract unless the parties thereto assent; and they
29 must assent to the same thing in the same sense. * * * A mere affirmation or proposition is not enough. * * * It becomes a contract only when the proposition is met by an acceptance which corresponds with it entirely and adequately. * * * The principle may be stated thus: The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provisions; and it must not qualify them by any new matter. * * * Where the answer, either in words or in effect, departs from the proposition, or varies the terms of the offer, or substitutes for the contract tendered one more satisfactory to the respondent, * * * there is no assent and no contract. The respondent is at liberty to accept wholly or reject wholly, but one of these things he must do; or, if he answers not rejecting but proposing to accept under some modification, this is a rejection of the offer. * * * An answer or a compliance has been sometimes held insufficient to make a contract, where the difference of terms between the parties did not seem to be very important. In fact, the court seldom inquires into the magnitude or effect of this diversity; if it clearly exists, that fact is enough."

In the light of the doctrines thus succinctly and clearly stated, let us first see what the claimant offered in his letter. His proposition contained the following eight particulars:

1. To lease a part of the Kalorama tract, comprising the house and porter's lodge, with thirty acres of land.
2. The premises to leased for the purpose of a hospital.
3. The lease to be for three years.
4. The rent to be $450 per month.
5. The Government to have the privilege to renew the lease for three years longer at the same rent.
6. The trees and shrubbery on the grounds to be strictly protected, and any unnecessary injury thereto to be compensated for by the Government.
7. The buildings to be kept in repair by the Government, and to be left in as good repair as ordinary wear and tear would permit.
8. The fence on the property, which had been destroyed by troops during a previous occupancy, to be renewed by the Government, and left in good repair at the expiration of the term.

It is no exaggeration to say that General Mansfield's letter did not accept a single one of those eight particulars. On the contrary, he made a counter-proposition, containing the following five particulars:

1. To hire the whole Kalorama property; which is shown by the evidence to have embraced about ninety acres.
2. The rent to be $500 per month.
3. The time to be one year.
4. The Government to have the privilege of keeping it at least three years if desirable.
5. The property to be used for all purposes.

This was not merely a modification of the claimant's proposition; it was, in law, a clear and distinct rejection of it, by making a totally different one, which the claimant could accept or not, as he saw fit. There is no evidence of an express acceptance of it by him, but abundant evidence of his implied assent, in two facts:

1. That the premises were, as General Mansfield's letter required, vacated by the claimant, or those then occupying them, within the time specified in that letter, and the occupancy turned over to the Government; and, 2. That the claimant received the rent of $500 per month as stipulated by General Mansfield, until the same was reduced to $250 per month; that is, from August 23, 1861, to June 30, 1862. Of course, if the claimant's proposition had been agreed to by General Mansfield, only $450 per month would have been paid; and equally, of course, if the claimant had not accepted General Mansfield's counter-proposition, he would not have been paid $500 per month.

Thus it is to my mind clear that the claimant's proposition was never accepted by the Government, and that General Mansfield's counter-proposition was accepted by the claimant. If this be so, then that part of the claimant's case which seeks to charge the Government ex contractu for the value of the house that was burned, and for the injury done to the premises by the troops, falls to the ground.

But so far as the injury to the premises is concerned, there is another and more conclusive defense, in that this court is, by the first section of the act of July 4, 1864, (13 Stat. L., 381,) expressly denied jurisdiction of any such claim. That section is as follows:

"That the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the Army or Navy,

or any part of the Army or Navy, engaged in the suppression of the rebellion, from the commencement to the close thereof."

I am unable to comprehend how, in view of that provision, it could be supposed that this court has any semblance of authority to consider this part of the claimant's demand. If that language be not clear enough, full enough, and strong enough to debar recourse here on such a claim, I should be at a loss to know what form of words could be effectual to that end. In my judgment, this court has no more right to take jurisdiction of such a claim than it would have of an action for an assault and battery.

13 In the Court of Claims.

THOMAS R. LOVETT
vs.
THE UNITED STATES. } No. 6247.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the Attorney-General for the defendants for the allowance of an appeal, as filed in the clerk's office, June 30, 1874, and of the order of the chief-justice of said court allowing the same; of the cross-appeal of claimant as filed in clerk's office July 30, 1874, and allowed by the chief-justice of said court; of the findings of fact by the court and conclusions of law thereon on which the court founded its judgment; of the opinion of the court and the dissenting opinion of Drake, chief-justice.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this fifteenth day of October A. D. 1874.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 152. The United States, appellants, vs. Thomas R. Lovett. No. 153. Thomas R. Lovett, appellant, vs. The United States Court of Claims. Filed 15th October, 1874.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES, APPELLANT,
vs.
THOS. R. LOVETT. } No. 152.

CROSS-APPEALS FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES, APPELLANT,
vs.
THOS. R. LOVETT.
No. 152.

CROSS-APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

In this suit, brought to recover the rent of an estate lying along Rock Creek, in the District of Columbia, known as "Kalorama," the Court of Claims found that the petitioner, as trustee of Louisa Fletcher, was seized in fee of the premises; that application having been made to him by General Mansfield for a lease of the premises to the United States for a hospital, he caused the two following notes relating to that subject to be addressed to General Mansfield. In response to these notes, General Mansfield sent to the petitioner the reply which follows them below:

"GENERAL: Inclosed is a note of terms for the mansion and lower grounds of Kalorama.

"The upper grounds contain about seventy acres, which

may be occupied by the quartermaster for horses and wagons, or whatever else may be desired, at the rent of one hundred dollars per month.

"Respectfully,

"CHARLES F. FLETCHER,

"*For Thomas R. Lovett, Trustee.*

"To Gen. MANSFIELD, *B. G., &c.*"

"KALORAMA, *August* 17, 1861.

"Gen. MANSFIELD:

"SIR: I offer to the Government, for the purposes of an hospital, that part of the place known as Kalorama, comprising the house and porter's lodge, together with about thirty acres of land immediately surrounding and including both sides of Rock Creek, bordering the same, upon the following terms:

"The lease to be for the term of three years, with the privilege to the Government to renew the same for three years longer, at the same rent, at $450 per month.

"There will be left in the building a portable furnace and hall-stove for the use of the Government. It will be stipulated that the trees and shrubbery on the grounds shall be strictly protected, and any unnecessary injury to the same to be compensated for by the Government. The buildings to be kept in repair by the Government, and to be left in as good repair as ordinary wear and tear will permit. The grounds having already been occupied by troops, and the fence thereby destroyed, it is expected that the Government will renew them, and leave them in good repair at the expiration of the term.

"Very respectfully, yours, &c.,

"CHARLES F. FLETCHER,

"*For Thomas R. Lovett, Trustee.*"

"HEADQUARTERS DEPT. OF WASHINGTON,

"*August* 17, 1861.

"As soon as vacated within two weeks, the United States will hire the whole property of Thomas R. Lovett, trustee of Mrs. Charles Fletcher, &c., above, on the fol-

lowing terms, inclusive of his upper lot and all his land and privileges, for $500 per month, for the period of one year, with the privilege of keeping it at least three years, if desirable, for all purposes.

"MANSFIELD,
"*B. G., &c.*"

Under the agreement above made, the United States entered upon and occupied the premises from August 23, 1861, to September 30, 1867, inclusive. From August 23, 1861, to June 30, 1862, the United States paid Lovett the rent at $500 a month, in monthly payments, for each of which the petitioner receipted, as "for rent of Kalorama, occupied as a hospital," (for the month specified,) "at $500 per month."

From July 1, 1862, to February 1, 1865, the United States paid Lovett rent at the rate of $250 a month, the petitioner receipting for each installment as "for rent of Kalorama, occupied as a hospital and camp-grounds," (for the month specified,) "at $250 per month."

From February 1, 1865, to September 30, 1867, rent was paid and receipted for monthly at $200 a month, "for rent of Kalorama, as hospital and camp-ground."

Between August 23, 1861, and September 30, 1867, while the premises were in the occupancy of the United States, the main house was burned, the flower garden and shrubbery destroyed, three and a half miles of fence torn down, as was a brick wall 50 feet long, 9 feet high, and 14 inches thick. The bricks were used for pavement and partly to build lime-house for purifying clothes. Some sheds were torn down. The part of the house not burned was greatly damaged, the sashes and glass being carried away. Trees planted for ornament and shade were cut down, a stone wall was torn down, and

most of it carried away; and stone was quarried and gravel dug from the premises and carried away. The estate was left in a dilapidated condition and the house unfit for occupancy. To have restored both to the condition they were in August 17, 1861, (reasonable wear and tear excepted,) would cost $20,000. Two regiments of United States troops were encamped on the northern portion of the estate *before* the written contract was made, by whom 1,500 trees were cut down and a part of the fencing destroyed.

The dwelling-house was used as a small-pox hospital, and the grounds for camp purposes. Seven or eight United States soldiers were buried there. From the last day of September, 1867, to the date of filing the petition, September 3, 1870, the property was not rented.

The house was insured for $10,000, which sum was paid after it was burned, as for a total loss.

December 21, 1868, Mr. Lovett, by his present attorney, presented a claim against the United States to the War Department for $27,861.85. He was notified February 8, 1870, by the Deputy Quartermaster-General, that this claim had been referred to the Third Auditor for payment of $21,040.42.

At the request of claimant, the Court of Claims further found that in October, 1867, he presented a claim for the difference between rent during the whole occupancy at $500 a month ($36,645.16) and the sum actually paid him therefor, ($19,295.16,) the balance being $17,350; also for the estimated cost of rebuilding the house burned, (put at $16,300,) less the $10,000 insurance received; and an itemized statement of the other injuries done to buildings, trees, grounds, &c., amounting to $8,843.25, making the aggregate of his claim then presented, $32,483.25.

Upon this claim the then Deputy Quartermaster-General reported, November 11, 1869, that he considered the possession taken by General Mansfield, and his order to pay $500 a month, sufficient evidence of a contract or lease, and therefore recommended payment of that rate for the full time the Government used the estate, that $602.50 be paid for gravel taken, $2,300 for repairs, $581.75 for stone quarried upon the estate, and $218 for minor items. This report was approved by the Secretary of War and the claimant notified (as beforesaid) February 8, 1870, that his claim had been referred to the Third Auditor for the payment of $21,080.42. The accounting-officers of the Treasury disapproved of the recommendation of the War Department, and rejected the claim, except as to the sum of $5,159.99, of which action the claimant was duly advised.

While his claim was pending before the War Department Lovett addressed a letter, dated January 31, 1868, to the Quartermaster-General, in which, after a general reference to the Kalorama estate, he says: "It was hired August 17, 1861, by General Mansfield, on the part of the Government, as a hospital and camp-grounds, by written contract, at a monthly rent of $500; *of which contract the following is a copy.*" He then recites *only* the document issued to him by General Mansfield, August 17, 1861, and concludes his letter by saying that possession of the premises was given August 23, 1861, and that "on the 10th day of October following *the contract* was filed in the office of Capt. E. E. Camp, assistant quartermaster, and by him entered on the roll by order of Brigadier-General Van Vliet.'

The statute of limitations and a general denial were seasonably pleaded by the United States.

Upon the foregoing facts, the Court of Claims found, as conclusions of law, (Record, 14, 15:)

1. That the letter of Charles Fletcher, for Thomas R. Lovett, trustee, dated August 17, 1861, addressed to General Mansfield, as qualified by General Mansfield's reply of same date, and with that, made a contract of lease subsequently acted upon by the parties, by the terms of which the United States were bound to repair the premises in case of their damage by fire, and to release them in as good repair as ordinary weather would permit.

2. That under said contract and under the tenancy between the parties the United States were liable for injuries to the premises in the nature of waste.

3. That the claimant is not entitled to damages for the use of the premises as a small-pox hospital by the United States.

4. That the claimant is barred of all claims for reductions of rent by his receipts in full given for such rents.

5. That the United States were not entitled to be credited with $10,000 paid to the claimant by insurance companies on policies of assurance obtained and paid for by him for his benefit.

6. That the report of the officers of the Quartermaster's Department, that $21,040.42 were due to the claimant, approved by the Secretary of War, and *ratified* [notified ?] by the War Department to the claimant, was not binding and conclusive on the United States.

7. That the claims of the petitioner for loss by fire and damage by acts of waste were not barred by the statute of limitations. (Record, 14, 15.)

Thereupon judgment was entered in Lovett's favor for $20,000. (Record, 6, folio 14.)

The United States appealed. (*Id.*, 7.)

ASSIGNMENT OF ERRORS.

The United States assign as error said judgment and the findings above, numbered 1, 2, 5, and 7.

BRIEF.

I.

What is the contract made between these parties? In what papers, if any, is it to be found?

We say, it was completed by the verbal or implied assent of Lovett to the proposition contained in General Mansfield's letter of August 17, 1861; while the claimant is supported by a majority of the Court of Claims in his effort to bring into the case his own letter of that date to General Mansfield, and to make its contents part of the contract, so far as not palpably and directly repugnant to those found in General Mansfield's letter.

We consider Mr. Lovett's letter of August 17, 1861, "a mere offer, not assented to," which (as Story says) "constitutes no contract; for there must be not only a proposal, but an acceptance thereof." (Story on Con., § 490.) The learned chief-justice of the Court of Claims, in his able dissenting opinion, has strongly emphasized the difference between the proposition made by Mr. Lovett and that made by General Mansfield, as showing that the latter can only be deemed a rejection of the former, and the substitution of something entirely different. (See Record, page 20.) We will only state the antagonisms article by article.

Mr. Lovett proposed to lease a *part* of the estate, to wit, 30 acres, with house and lodge. General Mansfield did not consent to take a part on *any* terms, but

would take the whole, consisting of 90 acres. Lovett offered it for hospital purposes. General M. proposed to take it for *all* purposes. The owner desired to lease this part for three years, with right of renewal for like term, at $450 a month. General Mansfield would hire the whole for but one year certain, at $500 a month, with right to retain it three years, if desirable.

The remaining propositions of Lovett were, that the shrubbery was to be protected, &c.; the buildings to be kept in repair; and the fence, *previously* destroyed, to be renewed and left in good repair at the end of the term. As Judge Drake says, General Mansfield did not accept a single one of Lovett's propositions. The nature of the occupancy would make it absurd that this officer should assume to protect the shrubbery, and the intended use would inevitably expose it to more than "*ordinary* wear and tear." There is nothing to indicate an assent by General Mansfield to any one item of Mr. Lovett's proposition, but the reverse. Even if Lovett did suppose that the propositions made by him, as to the trees, repairs, fences, &c., were acceded to, that can make no difference, unless General Mansfield also so understood; so that both assented to the same thing in the same sense. Otherwise, at best, there would only be a failure of the express contract by reason of mistake—not any obligation imposed by the writing upon the United States. (Hazard *v.* N. E. Ins. Co., 1 Sumn., 225, bottom.)

Lovett sets up a contract, containing these special terms, with the United States. Then the burden is upon him to prove it by satisfactory evidence. If, after adducing all he has, the thing is left in doubt, even then he cannot recover; certainly not where the natural implication of the language used by the United States

is against him. "There must be a *distinct* acceptance of the terms offered" to bind the other party. (Andrews *v.* Garrett, 6 C. B., (N. S.,) 269; Tuttle *v.* Love, 7 Johns., 471.)

Story states precisely the doctrine which we believe applies here: "§ 503. But, if a proposition be made with certain conditions or limitations, the acceptance must correspond to it in terms, *or otherwise it will be considered a new proposition*, requiring the subsequent assent of the other party to render it binding." (1 Story on Con., (5th ed., 1874,) 455; Slaymaker *v.* Irwin, 4 Whar., 369; Honeyman *v.* Marryatt, 6 Ho. of Lords Cas., 112.)

It was an every-day occurrence. One person makes an offer; the other, to whom it is made, says, "No," but immediately makes an offer in his turn, which is accepted; this constitutes the latter offer as the terms of the contract, and the former has no more effect than if never proposed.

On this head nothing can be added to the clear statement in the dissenting opinion of Drake, C. J., to which reference is made, except to say, that, in his communication of January 31, 1868, to General Rucker, (Record, 14,) the claimant expressly declares this letter of General Mansfield to be the contract under which Kalorama was occupied, and recites it in full as containing the terms of the occupation, and that it was filed as the contract in the Quartermaster's Office soon after possession was taken. This shows that both parties did agree that General Mansfield's letter was the only written evidence of the contract between them.

II.

General Mansfield's letter was no *lease* at all. It is a misnomer to call it so. It merely proposed to the owner

terms upon which the Government would (if those terms were assented to) occupy the estate. A lease is given by the landlord to the tenant, as evidence of the latter's right to enter upon and retain possession of the demised premises; not a letter from one proposing to become a tenant, if his wishes are acceded to. A tenant's letter cannot possibly be construed as a lease; certainly, then, the letter of a person proposing an occupation in the future cannot be.

Lovett's assent to the proposal made its terms those of the holding, but did not make the letter a lease; the letting was verbal. Under the first section of the Statute of Frauds, it was a mere tenancy at will.

There was no liability to rebuild in case of fire. (Taylor's Land & Ten., 101, § 146; Leach *v.* Thomas, 7 Carr. & P., 327; Horsefall *v.* Mather, Holt, 7; Brown *v.* Crump, 1 Marsh., 567; Rook *v.* Worth, 1 Ves., sr., 462; Wainscott *v.* Silvers, 13 Ind., 497; Warner *v.* Hitchins, 5 Barb., 666.)

The court rested this liability upon the erroneous assumption that the property was occupied under an express agreement to repair, agreeably to the contents of Mr. Lovett's letter of August 17, 1861. (Record, 15, 16; folio 25.)

III.

The stipulation for rent at $500 was positive only for one year, to be continued for three more if desirable. It was paid for that year, except for July and a fraction of August. To avoid a return of the premises to him at the expiration of the year the claimant assented to a reduction, commencing before the year closed; and after its expiration, and when the three years additional had nearly passed, to a further reduction.

Whatever his motive, he is bound by his assent; especially as the Government continued an optional occupancy upon the faith of his acquiescence. (United States *v.* Clyde, 13 Wall., 35.)

IV.

If not holding under Lovett's letter, the Government were no more liable to make repairs than to rebuild.

If not liable to rebuild, then they have no claim upon the $10,000 insurance; if so liable, it would be equitable to subrogate them to the claim of Lovett against the insurance companies, and to give the United States the benefit of the $10,000 by him received of these companies; and he did so in the claim he presented to the War Department.

But we propose to rest upon the proposition that the Government were not bound to rebuild; and, therefore, shall not further consider this branch of that topic.

V.

If the United States should be held morally responsible for damage done to these premises by its troops, jurisdiction over this subject is denied to the Court of Claims by act of July 4, 1864, c. 240, § 1, 13 Stats., 381.

VI.

To sustain his claim, it was incumbent upon the claimant to prove a cause arising within six years. He is to prove the facts to support his claim. It should appear when they occurred. That is an element of *his* case.

VII.

The Court of Claims apparently adopts claimant's assumption that the property was taken "for hospital

purposes," notwithstanding General Mansfield's rejection of that limitation, and declaration that if taken, it will be used "for *all* purposes," including those of a hospital.

It was for a soldiers' hospital; to receive those sick of such diseases as troops are exposed to, of which small-pox is one of the most common.

EDWIN B. SMITH,
Assistant Attorney-General.

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In the Supreme Court of the United States.

THOMAS R. LOVETT *vs.* THE UNITED STATES

AND

THE UNITED STATES *vs.* THOMAS R. LOVETT.

No. 152.

BRIEF FOR THOMAS R. LOVETT, APPELLANT.

This is an appeal from the Court of Claims.

The claimant, Lovett, claimed about $60,000, and recovered judgment for $20,000, from which judgment both parties appeal.

The Case.

During the war, in 1861, the United States rented from Lovett a country seat called Kalorama, adjoining this city on the north, and comprising about ninety acres. There was on the land a large mansion home, with wings, measuring in all 150 feet by 40 and outbuildings; and the grounds around the house were laid out in walks, gardens, and lawns, and planted with shrubbery. Rec., p. 7.

The elevated and retired situation of the place, and its extensive grounds and shade, rendered the place desirable as a hospital, and General Mansfield applied to the claimant to rent for that purpose. Rec., p. 7.

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claimant, from August 23, 1861, to October 1, 1867. Rec., p. 8, fol. 18.

When the United States surrendered the property in October, 1867, it was in a condition of entire dilapidation, so as to be utterly unfit for occupation.

The Court of Claims say in their findings:

"While the United States occupied the premises from August 23, 1861, to September 30, 1867, the main house was burned; the flower garden and shrubbery destroyed; three and one-half miles of fence torn down; a brick wall 50 feet long, 9 feet high, and 14 inches thick was torn down, and the bricks used partly for pavement and partly for building a lime house where the United States put clothes for purifying them; and some sheds were torn down. The part of the house not burned, about 50 feet long, was greatly damaged, and the glass with the sashes were carried away. Ornamental and shade trees of various kinds were cut down; a stone wall was taken down, and most of it carried away; and stone was quarried and gravel dug from a stone quarry and gravel pit on the premises and carried away, and the premises were left in a dilapidated condition, and the house unfit for occupancy; and to have restored the building and premises to their condition when leased, reasonable wear and tear excepted, would have cost $20,000."

The court then states that materials were carried away to the value of $2,857.95; that the value of other items was not shown; that the troops of the United States did all damage complained of; and proceeds:

"The dwelling house was used by the United States for a small-pox hospital, and the grounds as a camping ground for soldiers. Seven on eight soldiers who died were buried on the place; and since it was vacated by the United States it has not been rented." Rec., p. 10.

The claim founded on these same facts being presented

to the War Department, was referred to the Quartermaster General, who reported to the Secretary of War recommending the allowance of $21,040.42, which the Secretary approved, and the account was, by the Quartermaster General, sent to the auditor for payment, and the claimant was notified, but the auditor refused to pay the account. Rec., p. 13.

The court gave judgment for $20,000, but without specifying in the judgment, in the findings of fact, or in the conclusions of law, how this amount was arrived at.

The claimant, appellant, is therefore limited in his assignment of error to the conclusions of law. And he assigns for error that the court erred in their 3d and 4th conclusions of law, in which they held:

3d. That the claimant can recover nothing for the use of the premises as a small-pox hospital.

4th. The claimant is barred of all claim for the agreed rent of $500 per month by having accepted and receipted for smaller sums.

II.

That the claimant could not recover for the use of the property as a small-pox hospital.

The contract, found by the court to consist of the propositions of the claimant and the answers, allowed the use of the property as a hospital, but it was used to the detriment of the claimant, the buildings as a small-pox hospital and the grounds as a cemetery for small-pox patients.

The court hold that this use was justified by the contract.

But in every agreement to renting there is an implied contract not to put the premises to any purpose materially different from their usual employment.

The building when taken by the United States was "a dwelling house * * with a garden, lawns and walks;" its usual employment was, therefore, for the residence of

persons. It was hired for the residence of sick persons, where they could receive treatment. Any use which rendered it thereafter unfit for the occupation of persons generally, was a deviation from its usual employment. It was indeed rented for a hospital; that is, as a residence for sick people; but it might have been used as such without rendering it unfit for its original purpose. Small-pox is a disease of peculiar virulence, and is peculiarly contagious. The contagion is readily communicated and lingers long in any building where the cases have been treated.

The difference between small-pox and ordinary diseases is recognized in Rex *vs.* Sutton, 4 Barr., 2116; Rex *vs.* Vantandillo, 4 M. and S., 73; and Rex *vs.* Barnett, Id., 272.

It is an indictable offence to set up a small-pox hospital near the public streets. 3 Chitty, Cr. Law, 636, gives the form of indictment for maintaining "a certain house and place for the reception and entertainment of persons laboring under a certain dangerous and infectious distemper called the small-pox."

These authorities take this disease out of the category of ordinary diseases, and exclude from the agreement for reception of sick persons, generally, those diseased persons whose distemper necessarily infects the premises rented.

Independently of any express agreement, the law imposes upon every tenant, whether for life, or years, an obligation to treat the premises in such a manner that no substantial injury shall be done to them; and so that they may revert to the lessor at the end of the term, unimpaired by any willful or negligent conduct on his part. Taylor's Landlord and Tenant, sec. 1, par. 343.

Extract from 2 Robinson's Practice, 384–5:

"II. *Action lies against tenant for not using premises in a tenant-like manner, or for breach af contract to deliver up the same in good repair.*"

"Out of the relation of landlord and tenant, there arises on the part of the tenant an implied contract to use the leased premises in a tenant-like manner. It arises, not withstanding, that in the articles of agreement there is an express stipulation to leave the premises in the same state as they were at the commencement of the tenancy. (White *vs.* Nicholson, 4 Man. and Gr., 95; 43 E. C. L. Rep. 58.) But it does not arise when the tenant holds under an express contract which provides for the very matter—*keeping* the premises in tenantable repair. Standen *vs.* Christmas, Etc., 10 Adal. and Ell., U. S., 135; 59 E. C. L. Rep., 135."

Nave *vs.* Berry (22 Ala., 382.) was an action of assumpsit upon a lease of a tavern building, which was by an assignee of the lessees used as a ladies' seminary; and while so used, was destroyed by fire. Lessor contended that such use was not authorized by the lease. The court held that it was, the lease simply designating it as the old tavern building, and containing no stipulation as to its future use; and on this subject said:

"On the part of the lessor, in addition to the express stipulations in his favor, the law implies his right to have the property used in a proper and tenant-like manner, without exposing the buildings to ruin or waste by acts of omission or commission; and, also, that the premises should not be put to a use or employment materially different from that in which they are usually employed. To the extent of these implied rights on the part of the lessor, the law implies also a corresponding obligation on the part of the lessee.

The lessees have, by implication, the right to possess and enjoy the property during the term specified, and to put it to such use and employment as they please, not materially different from that in which it is usually

employed, to which it is adapted and for which it was constructed."

Nave *vs.* Berry, *et al.*, 22 Ala., 382.

2. *That the claimant is barred of all claims for reduction of rent by his receipts in full given for such rents.*

The Court have found that the United States held the premises from Aug. 23, 1861, to September 30, 1867, under an agreement in writing reserving a rent of $500 per month, and that this rent was not paid, but only a smaller sum was paid and receipted for in the terms stated in the finding. The petition averred (Rec. p. 1, fol. 3,) that under an order of the Secretary of War and without the concurrence of the claimant, the monthly payments had been reduced to $250 and afterwards to $200, and the Court finding that these amounts having been receipted for as the monthly rents, rule that such receipts barred all further claims. It is conceded that such receipts would be evidence tending to show that the original contract had been changed or modified, but the Court did not consider them in such light, but finding in effect that the contract of lease remains unchanged, rule that the receipt of $250 was a satisfaction of a debt of $500.

Such is not the law.

"The payment of a part of a debt is no legal satisfaction of the debt, although the creditor receive the smaller sum in full discharge of the whole demand and give a receipt accordingly."

Chitty Const., 578 and cases cited.

There are no facts in this case to bring it within the adverse ruling of this court in the cases of Adams *vs.* The United States and Child *vs.* The United States

Conclusion.

It is submitted the judgment of the Court of Claims should be reversed with directions to increase the amount

of such judgment by such allowances as the evidence shows to be just for the injury to the claimants by reason of the care of the premises as a small-pox hospital and cemetery.

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